SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
AUG 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

_____ Term, 1974

No. 74-189

MARY IM, ELIZABETH IM and PATRICIA IM, minors, by their parent and natural guardian, HO SUK IM,
Petitioners,

vs.

ROBERT BORK, Attorney General of the United States of America, and BERTRAM BERNARD, District Director of Immigration and Naturalization for the Western District of Pennsylvania,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

_____ Term, 1974

No. _____

MARY IM, ELIZABETH IM, and PATRICIA IM, minors, by their parent and natural guardian, HO SUK IM,

Petitioners.

vs.

ROBERT BORK, Attorney General of the United States of America, and BERTRAM BERNARD, District Director of Immigration and Naturalization for the Western District of Pennsylvania,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, MARY IM, ELIZABETH IM and PATRICIA IM, minors, by their parent and natural guardian, HO SUK IM, respectfully pray that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 1, 1974.

Opinion Below

No opinion was rendered by either the Court of Appeals or by the United States District Court for the Western District of Pennsylvania. The Judgment Order of the Court of Appeals and the Order of the District Court were entered without opinions. Both of said Orders are attached hereto as Exhibits "A" and "B" respectively.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on July 1, 1974, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked pursuant to Title 28 United States Code § 1254 (1).

Question Presented

1. Whether the minor American-born citizen children of alien exchange visitors have standing under Title 5, United States Code § 702, the Administrative Procedure Act, to challenge and prevent the deportation of their parents when said deportation will constitute either a *de facto* deportation of said children or a denial to said children of the benefits of a normal parent-child relationship.

Statutory Provisions Involved

United States Code, Title 5:

§ 702. Right of review

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

United States Code, Title 8:

§ 1105a. Judicial review of orders of deportation and exclusion—Exclusiveness of procedure

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, .

United States Code, Title 8:

§ 1252. Apprehension and deportation of aliens-Arrest and custody; review of determination by court

Proceedings to determine deportability: removal expenses

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation

that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and

under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraphs (4) to (7), (11), (12), (14) to (17), or (18) of section 1251(a) of this title. If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter.

Statement of the Case

Petitioners herein are the minor children (ages 1½, 3½ and 4½ years old, respectively, at the time of the filing of the original complaint) of two Korean nationals who arrived in this country lawfully as exchange visitors.

Petitioners were all born in this country, however, and are therefore all American citizens.

Recent amendments to the Immigration and Naturalization Act, Title 8 United States Code, imposed upon exchange visitors the requirement that they abide by the provisions of Section 212 (e) of the Immigration and Naturalization Act which obliges said aliens to reside abroad in the country of their nationality or last residence for a period of two years before they could be eligible to receive immigration visas.

Through various administrative procedures beginning on July 8, 1971, Ho Suk Im, father of petitioners, sought to

obtain a waiver of the two-year foreign residency requirement. He failed, and on September 26, 1973, he and his wife were served with an order to show cause why they should not be deported. Following a hearing on the order to show cause, Ho Suk Im and his wife were granted ninety (90) days within which to leave the country voluntarily, failing which they would be deported.

Thereafter, Petitioners, through their natural parent Ho Suk Im, sought by the within action to enjoin the deportation of their parents on the ground that such a deportation constituted a *de facto* deportation of themselves in violation of their constitutional rights to enjoy the benefits of American citizenship. Petitioners brought this action in the United States District Court because the administrative procedure originally invoked by their father failed to provide any opportunity for the raising and review of the constitutional issues which Petitioners seek to raise herein. The only review of the impact upon petitioners of the deportation of their parents concerned issues raised by § 244 (a) (1) of the Immigration and Nationality Act, which permits the Attorney General to suspend a deportation which would result in "extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States. . . ."

Because of their inability to raise other issues regarding the impact upon them of the deportation of their parents, petitioners filed the within actions in the United States District Court pursuant to provisions of the Administrative Procedure Act, Title 5 U.S.C. § 702, alleging that they were aggrieved by the administrative agency action of deportation.

A Motion to Dismiss was filed by the attorney for Defendants, which motion was granted by the District Court

without opinion. An appeal was taken and briefs prepared and oral argument had, but the Court of Appeals affirmed the judgment of the District Court, also without opinion.

The primary issue raised by respondents' motion to dismiss in the District Court and briefed and argued before the Court of Appeals was the threshold jurisdictional issue set forth above under the heading "Question Presented."

REASONS FOR GRANTING THE WRIT

The court below decided an important question of federal law in a manner in conflict with recent applicable decisions of this court.

A. While on numerous occasions during previous years this court has re-iterated the exclusivity of Congressional power to determine matters of immigration law and policy, substantial question concerning such exclusivity has been raised by the court in *Afroyim v. Rusk*, 387 U.S. 267, 87 S. Ct. 1660, 18 L.Ed. 2d 757 (1967).

Petitioners herein argued the applicability of *Afroyim* to their case, and since the court below failed to write an opinion, petitioners must assume the issues raised by that case were decided against them. Such a decision, therefore, Petitioners maintain, was against the principles announced in *Afroyim*, and should be reviewed by this court.

In 1951, this court observed "that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. *Harisiades v.*

Shaughnessy, 342 U.S. 580, 588-89, 72 S.Ct. 512, 96 L.Ed. 586 (1951). *Cf.*, also, *Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317 (1949); *Shaughnessy v. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1952); *Hintopoulos v. Shaughnessy*, 353 U.S. 72, 775 S.Ct. 618, 1 L.Ed. 2d 652 (1956).

Despite this attitude of judicial restraint, this court has, in *Afroyim*, indicated that a different attitude must prevail when the rights of citizens are involved. Petitioners maintain that the principles set down in *Afroyim* were violated by the decision of the court below and that decision must therefore be reviewed in light of that case.

In effect, what petitioners have said is that Defendants threaten to abridge petitioners' own citizenship by deporting their parents. The failure of the Court of Appeals to prevent such an abridgement, therefore, contravened the decision of this court that Congress does not have "the power to 'abridge,' 'affect,' 'restrict the effect of,' and 'take * * * away' citizenship." 387 U.S. at 267, 87 S.Ct. at 1667.

As petitioners had argued to the Court of Appeals, the facts of the instant case lead inescapably that the deportation of the alien parents constitutes an actual deportation of petitioners.

Under such circumstances, therefore, the failure of the Court of Appeals to decide in petitioners' favor constituted a decision in opposition to the decisional law of this court in regard to the Congressional and administrative power to abridge the citizenship rights of petitioners.

Since the deportation of their parents constitutes a *de facto* deportation of themselves, the Circuit Court has in effect permitted Congress to abridge the citizenship of petitioners by removing the single most important attribute of citizenship itself—the ability to remain here, despite

the holding of this court in *Afroyim* that "the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color or race." 387 U.S. at 268, 87 S.Ct. at 1668.

B. Further, by its judgment order, the court below impliedly determined that any remedy available to petitioners must be sought through the administrative procedures available in the Immigration and Nationality Act.

Such determination is in conflict with recent decisions of this court in two specific areas:

a. Recent decisions of this court have expanded the concept of "standing" to permit persons with non-economic interests to maintain actions so long as the interest sought to be vindicated guaranteed that a proper adversarial forum would exist for the resolution of the issues raised; and

b. Recent decisions of this court have indicated that only actions which constitute appeals from "final orders of deportation" need be brought in the Circuit Court under the Immigration and Nationality Act, but that an action not constituting such an appeal may be brought in the District Court.

The general rule on "standing to sue" as enunciated by this Court in *Association of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed. 2d 184 (1970), *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed. 2d 192 (1970), and *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed. 2d 636 (1972), all of which review the standing issue under the Administrative Procedure Act, § 702, are:

(1) That the statute under which the agency action complained of was taken does not authorize judicial review at the behest of the plaintiff;

(2) That the harm suffered by the plaintiffs constitutes a sufficient injury in fact that they can show such a personal stake in the outcome of the controversy so as to assure that dispute sought to be adjudicated will be presented in an adversary context;

(3) That the alleged injury was to an interest arguably within the zone of interest to be protected by the statute that the agency is claimed to have violated.

As this Court has indicated in *Sierra Club*, the "trend of cases arising under the APA and other statutes authorizing judicial review of Federal agency action have been toward recognizing that injuries other than economic harm sufficient to bring a person within the meaning of the statutory language," 405 U.S. at 738.

Despite the fact that petitioner showed by argument in the court below that the various provisions of the Immigration and Nationality Act did not authorize a review of the agency action at the behest of persons in petitioners' position, the Circuit Court nevertheless apparently decided that issue against petitioners in contravention of the principals enunciated by this court in the cases above. Should this decision be upheld then, it is apparent that American citizens would be totally bereft of any remedy whatsoever to challenge the action of the Immigration and Naturalization Service no matter how and to what extent that action effected the constitutional rights, freedoms, privileges and liberties of such citizens.

Furthermore, since no opinion was filed by the Circuit Court, it must be assumed that that court upheld the respondents contention in the District Court that petitioners should be required to pursue the administrative remedies available to their parents under the Immigration and

Naturalization Act, Title 8 U.S.C. § 1105 (a). Such a determination carries with it the implication that petitioners were seeking to review a "final order of deportation" within the meaning of § 1105 (a). Such an implication, however, is contrary to recent decisions of this court as enunciated in *Foti v. Immigration Service*, 375 U.S. 217, 84 S.Ct. 306, 11 L.Ed. 2d 281 (1963) and *Cheng Fan Kwok v. Immigration Service*, 392 U.S. 206, 88 S.Ct. 1970, 20 L.Ed. 2d 1037 (1968).

The Supreme Court has stated in *Foti* that:

> The fundamental purpose behind § 106 (a) [§ 1105 (a)] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby the persons subject to deportation were forestalling departure by dilatory tactics in the Courts. The House Judiciary Committee reports succinctly stated the problem to which Congress addressed itself in enacting § 106 (a). It indicated that the Committee has been disturbed in recent years to observe the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country. 375 U.S. at 217.

In *Cheng Fan Kwok, supra*, the Supreme Court further reviewed the purpose of § 106 (a):

> It is important, first, to emphasize the character of the statute with which we are concerned. § 106 (a) is intended exclusively to prescribe and regulate a portion of the jurisdiction of the Federal Courts. As a jurisdictional statute, it must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes. 392 U.S. at 212.

Although the petitioners argued to the Circuit Court that they were not seeking to review a "final order of deportation," but were seeking a stay of an admittedly valid order,

the Circuit Court elected to determine this issue against the petitioners, although this dichotomy has been recognized before in prior Federal Court decisions. In *Lam Tat Sin v. Esperdy*, 227 F.Supp. 482 (DCNY, 1964), aff'd 334 F2d 999, Cert. denied, 379 U.S. 901, 85 S.Ct. 190, 13 L.Ed. 2d 176 (1964), the District Courts' opinion was that:

> Jurisdiction in this action is not effected by § 106 of the Act (8 USC § 1105 (a)). § 106 provided for direct judicial review in the Court of Appeals of "all final orders of deportation." Plaintiff is not challenging the order of deportation in this case, but is seeking a stay of an admittedly valid order. 227 F. Supp. at 484.

Moreover, this Court itself has recognized distinction between a review of the final order under § 106 (a) and an attack upon the execution of an admittedly valid order in *Cheng Fan Kwok:*

> Concededly, the application for a stay assumed the prior existence of an order of deportation, but petitioner did not "attack the deportation order itself but instead [sought] relief not inconsistent with it."

Mui v. Esperdy, 371 F2d 772, 777. If, as the Immigration Service urges, § 106 (a) embraces all determinations, "directly effecting the execution of 'a final deportation order.' Congress has selected language remarkably inapposite for its purpose." 392 U.S. at 213

Petitioners maintain, therefore, that the determination of the Circuit Court in this case is at variance with the prior decisional law of the Supreme Court of the United States in area which affects the lives of many people. For these reasons, therefore, petitioners believe that their petition should be granted and the determinations of the lower courts reviewed.

Conclusion

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

FELDSTEIN BLOQM & GRINBERG,

By: .....,

JAY HARRIS FELDSTEIN AND
STANLEY M. STEIN,
Counsel for Petitioners.

707 Law & Finance Building,
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Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 73-2110 & 74-1592

MARY IM, ELIZABETH IM and PATRICIA IM, minors, by their parent and natural guardian, HO SUK IM,
Appellants.

v.

ROBERT BORK, Attorney General of the United States of America, and BERTRAM BERNARD, District Director of Immigration and Naturalization for the Western District of Pennsylvania.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D. C. No. 73-1057.

Argued June 24, 1974.

Before: ADAMS, HUNTER and GARTH, *Circuit Judges.*

Stanley M. Stein, Esquire, Feldstein Bloom & Grinberg, Pittsburgh, Pa. 15219, Attorneys for Appellants.

Richard L. Thornburgh, United States Attorney, Henry G. Barr, Asst. United States Attorney, Craig R. McKay, Asst. United States Attorney, Pittsburgh, Pa. 15219, Attorneys for Appellees.

Exhibit A—Judgment Order

Judgment Order

WHEREAS, this court granted a stay of the judgment in the District Court in Appeal No. 73-2110; and

WHEREAS, the order entered in Appeal No. 73-2110 was deemed to be unappealable in the form in which it was entered; and

WHEREAS, a new order was entered by the District Court on June 10, 1974; and

WHEREAS, the appellant filed a new appeal under No. 74-1592, that was based on the new order entered by the District Court under date of June 10, 1974, which this court views as an appealable order; and

WHEREAS, this court then granted a stay of the new order under date of June 24, 1974; and

WHEREAS, after careful consideration of the appellants' contentions and of the briefs and arguments of counsel, it is

ADJUDGED AND ORDERED that the judgment of the District Court dated June 10, 1974, be and is hereby affirmed and the order staying the judgment of the District Court entered on June 24, 1974, is hereby terminated.

Each party to bear its own costs.

BY THE COURT,
ARLIN M. ADAMS,
Circuit Judge.

ATTEST:

THOMAS F. QUINN,
Clerk.

Dated: Jul 1 1974.

Exhibit B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARY IM, ELIZABETH IM, and PATRICIA IM, minors, by their parent and natural guardian, HO SUK IM,
Plaintiffs,

v.

ROBERT BORK, Attorney General of the United States of America, and BERTRAM BERNARD, District Director of Immigration and Naturalization for the Western District of Pennsylvania,
Defendants.

Civil No. 73-1057.

Order

AND NOW, this 10th day of June, 1974, upon consideration of the record in the above-styled cause, and it appearing that on December 17, 1973, upon consideration of plaintiffs' complaint and application for preliminary injunction, and of defendants' motion to dismiss, said motion was granted and said cause dismissed, without prejudice to pursuing other remedies; but that no written order of dismissal was ever presented for signature or signed by the court;

IT IS ORDERED, ADJUDGED, AND FINALLY DECREED *nunc pro tunc* that said motion to dismiss is granted and said cause dismissed, for lack of jurisdiction and for failure to state

a cause of action cognizable in this court or upon which relief can be given by this court; and the aforesaid oral order of December 17, 1973, is hereby ratified, approved and confirmed, and the court declares that said order was and is intended and meant to be a complete, final, and absolute disposition of the case, so that no further proceedings were or could be had in this court thereon other than in the event of remand on appeal.

/s/ DUMBAULD,
United States District Judge.

Copies to:

Richard L. Thornburgh,
United States Attorney (15219).

Stanley M. Stein, Esquire,
707 Law & Finance Bldg.,
Pittsburgh, Pa. 15219.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-189

MARY IM, ET AL., PETITIONERS

v.

WILLIAM B. SAXBE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, infant citizens of the United States, contend that deportation of their parents abridges their rights as citizens.

Petitioners were born in this country while their parents, citizens of Korea, were here as non-immigrants. On December 10, 1973, petitioners brought an action in the United States District Court for the Western District of Pennsylvania seeking to enjoin enforcement of orders of voluntary departure which had been served on their parents on September 26, 1973. The district court dismissed the action on December 17, 1973, on the government's motion, and a written order of dismissal (Pet. App. B) was entered on June 10, 1974. In that written order the district court stated that petitioners had failed to state a cause of action and that in any event the court lacked jurisdiction to consider the claim. The court of appeals affirmed (Pet. App. A).

The district court correctly determined that it lacked jurisdiction since "[t]here is neither statutory nor decisional authority permitting district courts to entertain actions by the relatives of aliens to intervene in pending deportation proceedings," *Agosto* v. *Boyd*, 443 F. 2d 917 (C.A. 9); and petitioners have suffered no "legal wrong" as a result of the deportation order, *Dayao* v. *Staley*, 303 F. Supp. 16 (S.D. Tex.), affirmed, 424 F. 2d 1131 (C.A. 5).

Even assuming *arguendo* that the court had jurisdiction, the court was plainly correct in ruling that petitioners had failed to state a claim upon which they were entitled to relief. It is well settled that a deportation order directed against the parents of an infant citizen does not violate the child's constitutional rights.[1] See, *e.g.*, *Faustino* v. *Immigration and Naturalization Service*, 302 F. Supp. 212 (S.D.N.Y.), affirmed, 432 F. 2d 429 (C.A. 2), certiorari denied, 401 U.S. 921; *Perdido* v. *Immigration and Naturalization Service*, 420 F. 2d 1179 (C.A. 5); *Mendez* v. *Major*, 340 F. 2d 128 (C.A. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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[1]Petitioner's reliance upon *Afroyim* v. *Rusk*, 387 U.S. 253, is misplaced. In *Afroyim*, this Court held that Congress could not divest a person of his United States citizenship absent his voluntary renunciation thereof. Here, however, petitoners are free to remain in the United States if they wish.